

**Exhibit B**

Deposition of Robert M. Fishman

UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO

IN RE:

PROMESA

Title III

THE FINANCIAL OVERSIGHT AND  
MANAGEMENT BOARD FOR PUERTO RICO,

No. 17 BK 3283-LTS

as representative of

(Jointly

THE COMMONWEALTH OF PUERTO RICO,  
et al,

Administered)

Debtors.

IN RE:

PROMESA

Title III

THE FINANCIAL OVERSIGHT AND  
MANAGEMENT BOARD FOR PUERTO RICO,

No. 17 BK 3284-LTS

as representative of

PUERTO RICO SALES TAX FINANCING  
CORPORATION (COFINA)

Debtor.

DEPOSITION  
OF

ROBERT M. FISHMAN, ESQ.

Thursday, January 10, 2019

101 Park Avenue  
New York, New York

Reported by:

AYLETTE GONZALEZ, RPR, CLR, CCR

JOB NO. 153834

1  
2 DATE: January 10, 2019

3 TIME: 1:30 p.m.  
4  
5

6 Deposition of ROBERT M. FISHMAN, ESQ.,  
7 held at the offices of CURTIS,  
8 MALLET-PREVOST, COLT & MOSLE, LLP., 101 Park  
9 Avenue, New York, New York 10178, pursuant  
10 to NOTICE, before AYLETTE GONZALEZ, a  
11 Registered Professional Reporter, Certified  
12 LiveNote Reporter, Certified Court Reporter  
13 and Notary Public of the States of New York  
14 and New Jersey.  
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A P P E A R A N C E S:

CURTIS, MALLET-PREVOST, COLT & MOSLE

Counsel for Ambac Assurance

101 Park Avenue

New York, New York 10178

BY: MICHAEL MOSCATO, ESQ.

BY: GABRIEL HERTZBERG, ESQ.

BY: JACOB KEARNEY, ESQ.

KASOWITZ BENSON TORRES

Counsel for Whitebox Multi-Strategy

Partners, L.P.

1633 Broadway

New York, New York 10019

BY: TREVOR WELCH, ESQ.

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A P P E A R A N C E S: (CON'T)

REED SMITH

Counsel for Bank of New York Mellon

599 Lexington Avenue

New York, New York 10022

BY: LOUIS SOLOMON, ESQ.

BY: C. NEIL GRAY, ESQ.

ALSO PRESENT:

HOLWELL SHUSTER & GOLDBERG

BY: BRENDON DeMAY, ESQ.

1  
2 R O B E R T M. F I S H M A N,  
3 called as a witness, having been  
4 duly sworn by a Notary Public,  
5 was examined and testified as  
6 follows:

7 EXAMINATION BY

8 MR. HERTZBERG:

9 Q. Good afternoon, Mr. Fishman. My  
10 name is Gabe Hertzberg. I'm from the law firm  
11 Curtis, Mallet-Prevost, Colt & Mosle, the law  
12 firm where we're sitting today. Thank you for  
13 being here.

14 Have you been deposed before?

15 A. I have been deposed several times  
16 before.

17 Q. How many times have you been  
18 deposed?

19 A. Three times are coming to mind over  
20 40 years, but there could be more. Those are  
21 the three that I'm remembering right now.

22 Q. In those instances were you deposed  
23 in your capacity as an expert witness or as a  
24 regular witness?

25 A. Once as an expert, once as a fact

1 ROBERT M. FISHMAN (1/10/19)

2 witness and one is kind of hard to describe  
3 what exactly that role was.

4 Q. Tell me about the time that you  
5 were deposed as an expert.

6 A. It involved -- a long time ago. It  
7 involved a dispute that called into play  
8 commonalty between U.S. bankruptcy law and  
9 Mexican bankruptcy law. And there was a  
10 question about whether a U.S. Court could  
11 grant certain relief and they needed testimony  
12 about how a U.S. Court would decide if it  
13 could do what U.S. law required or if it  
14 needed to do what Mexican law required.

15 Q. What year was that, approximately?

16 A. 1990s. I'm not sure.

17 Q. And were you an expert on U.S.  
18 bankruptcy law?

19 A. Yes.

20 Q. What facet of U.S. bankruptcy law  
21 were you hired as an expert for?

22 A. I don't know that it was narrow. I  
23 think it was probably a sort of generally  
24 speaking. I don't -- you know, the case was a  
25 long time ago, I can't really recall the

1 ROBERT M. FISHMAN (1/10/19)

2 specific controversy or the issue that was  
3 involved in the underlying dispute.

4 Q. Was that the last time you were  
5 hired as an expert witness?

6 A. It was not the last time I was  
7 hired, but it was the last time I was deposed.

8 Q. Have you given testimony in court  
9 as an expert witness?

10 A. I have never given testimony as an  
11 expert witness unless we can figure out what  
12 to call that hybrid I described, which maybe  
13 it was an expert witness and maybe it wasn't,  
14 I don't know.

15 Q. Why don't you say a little more  
16 about it.

17 A. It was in the Tolson case in the  
18 early 1990s, and it involved testimony about a  
19 settlement between the debtor and the bank  
20 group of a series of fraudulent conveyance and  
21 related kinds of disputes. And the  
22 investigation that was conducted to support  
23 the settlement was an issue in controversy and  
24 I was a witness on that topic. And I don't  
25 know whether you'd call that an expert witness

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2 or not, but I was a witness.

3 Q. You're an expert witness -- or  
4 you're here today in your capacity as an  
5 expert witness, correct?

6 A. Yes.

7 Q. How do you understand the nature of  
8 your retention?

9 A. I'm not sure exactly what you mean  
10 by that.

11 Q. What is your area of expertise in  
12 this matter?

13 A. I see. Well, I have been a fee  
14 examiner in a number of cases, and I believe  
15 that it is the combination of my general  
16 experience as a bankruptcy lawyer and my  
17 experience as a fee examiner that gives rise  
18 to the notion that I am an expert.

19 Q. In your report --

20 MR. HERTZBERG: Which I will ask  
21 the reporter to mark and I'll hand you  
22 a copy, sir.

23 (Fishman Exhibit 1, Declaration of  
24 Robert M. Fishman was marked for  
25 identification, as of this date.)

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2 BY MR. HERTZBERG:

3 Q. So your report has been marked as  
4 Fishman 1, and you have that in front of you,  
5 correct?

6 A. Yes, I do.

7 Q. In your report you identify two  
8 prior matters in which you worked as a fee  
9 examiner, one of those is the Chapter 9 case  
10 of Detroit?

11 A. Correct.

12 Q. Another one is the bankruptcy  
13 arising out of the Petters' Ponzi scheme,  
14 right?

15 A. Correct.

16 Q. And are there any other matters in  
17 which you have worked as a fee examiner?

18 A. I believe the report also discusses  
19 my fee examinership in Velocity Holdings.

20 Q. Are there any other, other than  
21 those three?

22 A. No.

23 Q. In the Detroit matter, were you the  
24 only fee examiner in the case?

25 A. Yes.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. And you were appointed by the  
3 Bankruptcy Court?

4 A. Judge Rhodes, yes.

5 Q. And were you called upon in that  
6 case to set any budget for any litigation  
7 arising in that case?

8 A. I was not.

9 Q. Were you called upon in that case  
10 to review any budget for any litigation --

11 A. I was not.

12 Q. -- arising in that case?

13 How is it that that case prepared  
14 you in any way to be an expert in this one?

15 A. Well, I reviewed tens of millions  
16 of dollars of invoices for services rendered  
17 in what I'll call, very broadly speaking,  
18 comparable kinds of disputes. And so I had  
19 the opportunity to see what kind of lawyers  
20 provided what kind of service in conjunction  
21 with what other lawyers at their firms  
22 provided similar services and how many people  
23 they used to do X, Y and Z and what the cost  
24 of those things were. And I believe that we  
25 reviewed approximately \$175 million in

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2 invoices. And so I believe that it gives me  
3 some insight into the kind of costs that would  
4 be associated with major projects conducted by  
5 major firms in those kinds of cases.

6 Q. You mentioned "comparable kinds of  
7 disputes." What were some of the comparable  
8 disputes in the Detroit bankruptcy?

9 A. Well, there were many, many  
10 disputes in the Detroit bankruptcy case.  
11 There were fights about revenue streams of  
12 bonds. There were fights about special  
13 revenue streams versus general revenue  
14 streams. There were fights about the Detroit  
15 art museum collection. There were fights  
16 about the water and sewer district bond.  
17 There were fights about labor contracts.  
18 There were renegotiations of labor contracts.  
19 Those are the ones that come to my mind  
20 quickly.

21 Q. Were any of them state court  
22 actions?

23 A. No.

24 Q. Were any of them matters involving  
25 the rights and obligations of indenture

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2 trustees?

3 A. You know, I'm not sure.

4 Remembering that I am reviewing invoices and  
5 not so much reviewing pleadings, I did look at  
6 some pleadings, I'm just not -- I'm not  
7 certain on whether there were any implications  
8 for the rights of indenture trustees in those  
9 cases.

10 Q. What about your role in the  
11 Petters' bankruptcy; how did that differ from  
12 your role in Detroit?

13 A. Well, that was a private  
14 engagement. That was not appointed by the  
15 Court. The Petters' plan was confirmed  
16 sometime I think in 2016, if I remember  
17 correctly. A trustee, a post-confirmation  
18 trustee and a post-confirmation advisory  
19 committee were created under the plan. I was  
20 retained by them privately to be the -- I  
21 think we may have called it a fee  
22 administrator just to differentiate between a  
23 Court-position and a non-Court-appointed  
24 position to handle the professional fees for  
25 the myriad of post-confirmation legal services

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2 that the trustee and the advisory committee  
3 were utilizing to finish their obligations  
4 under the plan.

5 Q. How did that engagement differ in  
6 terms of your specific role in terms of  
7 reviewing legal bills from the Detroit case?

8 A. The context is a little different  
9 because it wasn't a Court-appointed position.  
10 So whatever authority, in quotes, you want to  
11 say is attributable to a fee examiner because  
12 of his appointment by the Court doesn't exist  
13 in the Petters' case.

14 In the Detroit case, a very  
15 intricate fee review order was drafted by me  
16 and commented on by others and ultimately  
17 entered by the Court, and so the fee review  
18 process was a Court-imposed fee review  
19 process.

20 In the Petters' case, I did the  
21 same thing, which is to create a fee review  
22 process. That fee review process was  
23 something that people had to voluntarily agree  
24 to be bound by. And of course the advisory  
25 committee made it a condition of their

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2 employment that they agreed to it. So it  
3 wasn't like it was really optional, but it  
4 didn't have the force of a Court order.

5 Secondly, in the Petters'  
6 situation, we used a slightly less formal  
7 process, mostly because the formality required  
8 by Title 9 of the Bankruptcy Code isn't  
9 present in the Petters' case, and so many of  
10 the bells and whistles that we needed in  
11 Detroit were unnecessary in the Petters'  
12 situation.

13 Q. In the Detroit case, did you have  
14 say over whether a particular fee entry by  
15 counsel in that case was reasonable or not  
16 reasonable?

17 A. Yes.

18 Q. And did the judge have some role in  
19 that as well?

20 A. Well, it's an interesting question.  
21 Chapter 9 is a lot different than Chapter 11  
22 in some very meaningful ways. And some of  
23 those really meaningful ways are the fact that  
24 parties are not retained pursuant to Court  
25 order. Fees are not allowed pursuant to Court

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2 order. Fee applications are not filed. And  
3 so I'd say it's a somewhat unsettled area of  
4 the law as to exactly what role a bankruptcy  
5 judge in a Chapter 9 case can have with  
6 respect to the approval of the fees of  
7 professionals paid for by the estate. And the  
8 provision in Chapter 9 that gives the judge a  
9 role in that issue is one that doesn't exist  
10 in Chapter 11, and it's in the planned  
11 confirmation part of the statute. And it says  
12 that one of the things that the Court has to  
13 find in order to confirm plan is that the fees  
14 are reasonable and had been publicly  
15 disclosed.

16 And so the judge wasn't involved in  
17 the operation of the fee review process at  
18 all. He just didn't have a role in it. He  
19 did ultimately find at the confirmation  
20 hearing that the fees that were incurred were  
21 reasonable, and that they had been publicly  
22 disclosed. I'm the one that did the public  
23 disclosure of the fees by the filing of the  
24 report that I did on a quarterly basis.

25 Q. Did there come occasions that you

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2 found that fees were unreasonable?

3 A. Well, I'd answer that question in  
4 two ways. There were many, many, many  
5 occasions where I raised questions about the  
6 invoices of the various professionals. And  
7 I -- the process was that I would send a  
8 preliminary report to whichever professional  
9 firm we're talking about and only to them in  
10 which I would question whatever I found in  
11 their invoice that I either needed clarifying  
12 or that I felt might not be reasonable or that  
13 I needed more explanation for in order to  
14 understand why it was reasonable.

15 And so every single month we sent a  
16 report to each of the professional firms, and  
17 then we had a discussion period by virtue of  
18 the Court order that followed that -- I want  
19 to say it may have been 20 days, but I may not  
20 be remembering correctly -- in which that  
21 professional firm and I would discuss my  
22 questions and their answers. And in most  
23 instances we were able to reach an  
24 understanding of an appropriate adjustment.  
25 Occasionally I was persuaded an adjustment

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2 wasn't needed. More times than not I  
3 persuaded them that some adjustment was  
4 needed. And in only one circumstance did I  
5 ever have to file a quarterly report which  
6 said someone's fees were unreasonable for a  
7 particular task. And the one time that I  
8 needed to do that, I did that and they called  
9 me up and said let's not do that again.

10 Q. When you would engage in that  
11 process that you just described where you  
12 would -- I'll be a bit colloquial here, but  
13 where you would push back on the fees; you  
14 understand what I mean by that?

15 A. Yeah.

16 Q. Where you would push back on the  
17 fees contained in a legal invoice that you  
18 were reviewing, what criteria did you use to  
19 determine that the fees were excessive?

20 A. Well, we created a list which maybe  
21 had, I'm estimating, 15 criteria that we used  
22 to review the fees and we assigned each one a  
23 letter. And when we went through the -- when  
24 the invoices were submitted, they were  
25 converted to Excel spreadsheets and we created

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2 a column for fee examiner comments, and one or  
3 more of those letters would go into a box in  
4 which we questioned the fees on that line, and  
5 then there would be a comment section out to  
6 the right of that where we would try to  
7 articulate with a little more detail what it  
8 was about the particular entry that gave us  
9 pause. And then that Excel spreadsheet with  
10 those letters and comments was what we would  
11 send as the preliminary report.

12 So it could be all kinds of things.  
13 It could be it's a duplicate entry. It could  
14 be you sent too many people to a deposition.  
15 It could be you used a senior person to do a  
16 junior person's work. It could be lumping or  
17 bundling, the kind of things that every  
18 Chapter 11 lawyer likes to talk about. It  
19 could be an unreimbursable expense or an  
20 excessive expense. Like I said, there were at  
21 least 15 things, and I really don't remember  
22 the whole list off the top of my head, but I  
23 would say that if you are looking at the list,  
24 as an experienced Chapter 11 lawyer, you  
25 wouldn't be surprised at the things that you

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2 would see on the list.

3 Q. So let me just pick out one of the  
4 things you mentioned.

5 A. Okay.

6 Q. Staffing and senior lawyers doing  
7 work that could be done by junior lawyers?

8 A. Sure.

9 Q. What is it about your experience  
10 that allowed you to make that call, whether --  
11 that there was some time entry and you  
12 determined that that time entry should have  
13 been -- or the work behind that time entry  
14 should have been done by a junior lawyer as  
15 opposed to the more senior lawyer?

16 A. All right. Let's use Jones Day as  
17 an example. They were the debtor's lawyers  
18 and they incurred more fees than anyone else.  
19 If David Hyman was reviewing documents for  
20 privilege, that would probably be something  
21 that I would question, why David Hyman would  
22 need to be reviewing documents for privilege.  
23 And I would suggest that there's likely not a  
24 justification for having your most expensive  
25 lawyer and your most senior lawyer reviewing

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2 documents for privilege. I would certainly  
3 give them chance to explain to me why he  
4 needed to do it instead of a \$450 an hour most  
5 junior associate.

6 So when it comes to going to  
7 hearings, when it comes to creating reports,  
8 when it comes to going to depositions or  
9 attending mediations or whatever things you  
10 can think of, I believe that I have a general  
11 sense what staffing should look like for most  
12 of these kinds of projects. That doesn't mean  
13 that a particular project doesn't justify more  
14 top-heavy staffing or it doesn't justify even  
15 less top-heavy staffing. Sometimes from the  
16 invoice itself you can't tell that, but that's  
17 the point of raising the question and asking  
18 for clarification. Because if there's an  
19 explanation as to why five lawyers needed to  
20 attend a particular deposition or a particular  
21 mediation, I might not be able to get that  
22 simply from the invoice, and so I give them a  
23 chance to explain to me why this particular  
24 circumstance would justify greater  
25 participation.

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2 Q. So there are some tasks -- and  
3 correct me if I'm wrong, but there are some  
4 tasks that are appropriate to be staffed with  
5 a concentration of junior lawyers and there  
6 are some tasks that law firms provide that are  
7 appropriate to concentrate with senior  
8 lawyers, right?

9 A. Well, I can't disagree with that  
10 general statement, no.

11 Q. And so let's take a task like  
12 document review.

13 A. Um-hum.

14 Q. That's a task that should be more  
15 concentrated in terms of staffing at the  
16 junior lawyer level, correct?

17 A. Well, talking about a hypothetical,  
18 document review of a hypothetical case, but my  
19 instinct is that generally speaking that would  
20 be true. I certainly appreciate that there  
21 might be circumstances in which that won't  
22 necessarily be true, but that's -- that's the  
23 point of the preliminary review. And the  
24 discussion is to give people a chance to  
25 explain why what appears to be top-heavy

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2 staffing isn't. And sometimes the  
3 explanations make sense to me and sometimes  
4 they don't.

5 Q. And there are other tasks like  
6 appearing at a court hearing for argument  
7 where you would expect to see a concentration  
8 of more senior lawyers; is that fair?

9 A. Yes, typically I would say that  
10 would be the norm.

11 Q. And so applying the same  
12 concentration of junior lawyers to senior  
13 lawyers across all tasks wouldn't fit within  
14 the framework that we just outlined, right?

15 A. Well, theoretically it might not be  
16 appropriate.

17 Q. Okay. How -- tell me how you came  
18 to be engaged for this project?

19 A. This one here?

20 Q. Yes.

21 A. A Reed Smith lawyer called me and  
22 explained the project to me and asked me if I  
23 thought I was capable of expressing opinions  
24 on the topic. And after a couple of  
25 back-and-forths, he and I decided that I could

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2 be an appropriate person to do that.

3 Q. When was that contact made?

4 A. The very first call came on  
5 Thanksgiving weekend, but then I didn't hear  
6 from anybody for a while or there was just  
7 sort of modest general follow-up and the  
8 real -- the real meat-and-potatoes discussions  
9 didn't occur until the middle of December.  
10 And I don't remember the exact dates.

11 Q. Who was the Reed Smith lawyer who  
12 contacted you?

13 A. The first person that contacted me  
14 was Eric Schaffer, who I've known for some  
15 time.

16 Q. That gets to where I was going.  
17 How do you know Mr. Schaffer?

18 A. From bankruptcy organizations over  
19 the years. I've never been in a case with  
20 him, but National Conference of Bankruptcy  
21 Judges, American Bankruptcy Institute,  
22 American College of Bankruptcy, I've seen him  
23 in those settings numerous times.

24 Q. Have you socialized together?

25 A. I have gone out to dinner with him

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2 at such conferences a few times. I have never  
3 socialized with him in other respects.

4 Q. Has he hired you as an expert  
5 before?

6 A. No.

7 Q. Has Reed Smith hired you as an  
8 expert before?

9 A. No.

10 Q. Has Reed Smith hired you for any  
11 purpose before?

12 A. I had a case referred to me by  
13 Reed Smith five, six, seven years ago.

14 Q. Was that by Mr. Schaffer?

15 A. No, it was by Stephen Bobo in the  
16 Chicago office who I've known for 30 years.

17 Q. Okay. What about The Bank of  
18 New York, have you ever had an engagement for  
19 The Bank of New York before?

20 A. I don't believe so.

21 Q. Have you ever appeared as counsel  
22 for The Bank of New York?

23 A. I don't believe so. I can't speak  
24 to whether anyone at my firm has, especially  
25 since I'm at a new firm. Frankly I don't even

1 ROBERT M. FISHMAN (1/10/19)

2 know the answer to that question other than it  
3 was cleared for conflicts. But I personally  
4 do not believe that I have represented The  
5 Bank of New York.

6 Q. And you've never done any work for  
7 Ambac Assurance Corporation, right?

8 A. I do not believe I have ever done  
9 any work for him.

10 Q. How about Whitebox Advisors?

11 A. Until this case was presented to  
12 me, I'm not sure I've even heard of them.

13 Q. Okay. Are you familiar with a  
14 gentleman named Daniel Goldberg?

15 A. I know him by name.

16 Q. Have you met him in person?

17 A. I met him in person once in line to  
18 get sandwiches for lunch.

19 Q. When was that?

20 A. Yesterday.

21 Q. Are you familiar with a report that  
22 Mr. Goldberg has written in connection with  
23 this matter?

24 A. I am familiar with it.

25 Q. That report is in front of you. It

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2 was marked earlier today.

3 A. Right here?

4 Q. You can refer to it if you need to,  
5 I just want you to know it's there.

6 A. Okay.

7 Q. The other document that's there --  
8 and his report is Goldberg 1. The other  
9 document that's there is Goldberg 2.

10 A. Okay.

11 Q. When was the -- I may have asked  
12 you this, I'm sorry. Have you ever spoken to  
13 Mr. Goldberg on the phone?

14 A. I have never spoke to him on the  
15 phone.

16 Q. Have you ever spoken to any of his  
17 colleagues at his law firm on the phone?

18 A. Not knowingly.

19 Q. Have you ever met with any of his  
20 colleagues from his law firm?

21 A. I have not.

22 Q. The report that is in front of you  
23 at Goldberg 1, when was the first time that  
24 you -- well, strike that.

25 The report that's in front of you

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2 as Goldberg 1, you've seen it before?

3 A. Yes.

4 Q. When was the first time you saw it?

5 A. Well, certainly it was in the  
6 latter part of December. I'm not sure that I  
7 could tell you precisely what day. I just  
8 can't. I guess I could look at e-mails and  
9 figure it out if I needed to, but I don't know  
10 the answer. But it was in late December.

11 Q. Do you understand the first time  
12 you saw it that you were looking at a draft of  
13 it?

14 A. I believe I was looking at a draft,  
15 yes.

16 Q. Did you subsequently see later  
17 drafts over time?

18 A. Maybe. Maybe one other one. I  
19 don't remember precisely. Maybe one.

20 Q. You mentioned that you saw  
21 Mr. Goldberg yesterday in line for sandwiches?

22 A. Yes.

23 Q. Was that at or near the law firm of  
24 Reed Smith?

25 A. It was at the law firm of

1 ROBERT M. FISHMAN (1/10/19)

2 Reed Smith.

3 Q. Were you there to prepare for  
4 today?

5 A. I was.

6 Q. Was it your understanding  
7 Mr. Goldberg was there to prepare for today?

8 A. It's my assumption he was.

9 Q. Did you prepare together?

10 A. We did not.

11 Q. When was the last time you read  
12 Mr. Goldberg's report?

13 A. I looked at part of it earlier  
14 today.

15 Q. How would you characterize the  
16 opinion that you've offered in this case?

17 A. I'm not sure what you mean by that.

18 Q. What is your expert opinion in this  
19 case?

20 A. Well, at a minimum, my expert  
21 opinion is that the amount of money that  
22 Mr. Goldberg has identified as an appropriate  
23 holdback for the anticipated litigation, the  
24 defining term that I think both he and I use,  
25 is a reasonable holdback.

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2 Q. And what is that amount that  
3 Mr. Goldberg estimates to be a reasonable  
4 holdback?

5 A. If I remember correctly, it's a  
6 range between 25 million and 40 million with a  
7 midpoint of 32 if my math is -- I know the  
8 round numbers. I don't remember the exact  
9 numbers.

10 Q. And describe for me as you  
11 understand it the anticipated litigation.

12 A. Well, I mean, I think in my report,  
13 I set out what I think the topics are, I'm not  
14 sure that I can recite them perfectly off the  
15 top of my head, but it involves claims by  
16 two -- I'll use the word "bondholders"  
17 loosely, two bondholders alleging gross  
18 negligence and/or willful misconduct and/or  
19 fraud on the part of the Bank of New York as  
20 trustee of the bonds.

21 Q. What is the nature of the failing,  
22 if you will, by the bank as alleged by the two  
23 bondholders?

24 A. Well, since the case isn't filed,  
25 I'm not sure I can answer that question.

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2 Q. When you say "the case isn't  
3 filed," what do you mean by that?

4 A. Well, my understanding is that the  
5 pending lawsuits, which I have at least looked  
6 at, are not necessarily the cases that we're  
7 talking about as the, quote/unquote,  
8 anticipated litigation, and that therefore I  
9 don't know what the allegations of the  
10 anticipated litigation are going to be, what  
11 the relief that's requested is going to be,  
12 what the damages that are going to be  
13 requested will be.

14 Q. Have you read the Complaints that  
15 were filed by Ambac and Whitebox, which are  
16 the two bondholders that you're referring to?

17 A. I certainly looked at them both.  
18 They are fairly lengthy and I would not want  
19 to say that I read them word for word, cover  
20 for cover, but I did try to get a flavor for  
21 what they were about.

22 Q. When did you first read the  
23 Complaints?

24 A. Sometime in the latter half of  
25 December.

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2 Q. Did you read the Complaints before  
3 you prepared a report?

4 A. Certainly.

5 Q. And you reviewed Mr. Goldberg's  
6 declaration before you prepared your report,  
7 correct?

8 A. I'm not sure that's 100 percent  
9 accurate. I think I probably was working on  
10 the report already in anticipation of what I  
11 thought Goldberg's report might say. I didn't  
12 write the parts that relied on his report  
13 before I saw his report, but there were plenty  
14 of parts of this that I could write without  
15 his report, and so I'm certain I had started  
16 those parts beforehand. Wasn't much time  
17 here.

18 Q. Are you referring to the background  
19 sections?

20 A. And -- well, yeah, I guess I'm  
21 probably referring to certainly Roman numerals  
22 I, II and III of the table of contents in my  
23 report.

24 Q. When did you first hear or learn of  
25 the estimated range that Mr. Goldberg was

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2 going to offer of 25- to \$40 million?

3 A. Sometime in late December. Like I  
4 said, I can't recall what day that was.

5 Q. And how long after you learned of  
6 that range did you determine that that range  
7 was reasonable?

8 A. Ten days, a week, give or take. I  
9 don't know. It could have been a little more,  
10 it could've been a little less. Those days  
11 all sort of seem the same to me right now.

12 Q. And what did you do in that week or  
13 ten days to get yourself comfortable that the  
14 range that Mr. Goldberg offered was  
15 reasonable? And please be as specific as you  
16 can.

17 A. Well, the main thing I did was read  
18 his report and his exhibits very carefully  
19 because I was asked to assume that what he  
20 provided was -- were the facts. That was an  
21 assumption that I was asked to make. And so I  
22 read them in order to understand the  
23 assumption because I couldn't express an  
24 opinion about the assumption if I didn't  
25 understand it.

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2 Q. Do you now feel that you understand  
3 Mr. Goldberg's assumptions?

4 A. I think I understand them fairly  
5 well, yes.

6 Q. Okay. Mr. Goldberg makes an  
7 assumption that the blended billing rate for  
8 the attorneys that are going to represent The  
9 Bank of New York and the anticipated  
10 litigations is -- well, let me ask you, do you  
11 recall what the blended rate is?

12 A. Well, there were two blended rates  
13 in his report. One was the simple, add up the  
14 lawyers, add up the rates, divide by the  
15 number of lawyers. And the second one was the  
16 weighted blended rate where he lowered the  
17 rate to account for more work by junior people  
18 and less work by senior people. If I remember  
19 correctly, the average number was 895, and the  
20 weighted number was 800. That's what I  
21 remember.

22 Q. And how did he arrive at the  
23 weighted figure?

24 A. I don't know what adjustment he  
25 made specifically in calculating the amount of

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2 time the junior people would spend versus the  
3 senior people, other than the extent to which  
4 if I engaged in a detailed mathematical  
5 analysis of his exhibits, I might be able to  
6 figure that out, but I was told to take those  
7 things as assumptions, and so I didn't try to  
8 deconstruct his number.

9 Q. Well, you would agree with me that  
10 built into the weighting are some assumptions  
11 about how many hours are going to be devoted  
12 to a particular task by junior people versus  
13 senior people, correct?

14 A. Yes, I think that's in his  
15 exhibits.

16 Q. And did you make any finding as to  
17 the reasonableness of that weighting?

18 A. I did because I looked at those  
19 exhibits, I read them very carefully line by  
20 line. And I -- again, trying to apply them to  
21 what I consider to be a hypothetical lawsuit  
22 is a little bit complicated, but I thought  
23 based on the assumptions that I was asked to  
24 make about what that anticipated litigation  
25 would look like and would involve, I found

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2 that the range of numbers that he put forth  
3 was reasonable.

4 Q. But, again, you don't know --  
5 correct me if I'm wrong. You don't know how  
6 the blended rate was arrived at mathematically  
7 in terms of weighting between junior lawyers  
8 and senior lawyers?

9 A. I did not do the math to figure out  
10 what adjustment he made specifically. I know  
11 it's a \$95 an hour adjustment and I'm not sure  
12 what weights he moved where in order to come  
13 up with that.

14 Q. Do you know whether he changed that  
15 weighting for a particular task so that a  
16 document review task, for example, would have  
17 a different weighting than an argument in  
18 court might have?

19 A. I believe on some of the tasks in  
20 his exhibit he specifically referenced --  
21 let's just call them less expensive lawyers to  
22 do certain document and privilege review  
23 stuff, I think they were \$350 an hour people,  
24 which would, by definition, sort of bring that  
25 weighted average down for those particular

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2 projects.

3 Q. But other than that one example of  
4 document review where there's a separate cost  
5 associated with the document review team, is  
6 there any other task where the weighting on  
7 the blended rate has changed from one task to  
8 another task?

9 A. I think the answer is no.

10 Q. Let's take a look at the  
11 spreadsheet that has been marked as Goldberg 2  
12 in front of you. And I'll represent to you  
13 that's Exhibit D to the Goldberg declaration.

14 A. There's two sides. I was going to  
15 say it's a two-page thing I thought.

16 Q. Let's take the first item on the  
17 spreadsheet.

18 A. Okay.

19 Q. So the first column has a dollar  
20 figure for the lower end of Mr. Goldberg's  
21 reasonable estimate, correct?

22 A. Yes.

23 Q. And the second column is the number  
24 of hours estimated for that task, correct?

25 A. Yes.

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2 Q. And if you look at the next column  
3 over, which is "Explanation," Mr. Goldberg has  
4 inserted some explanation for how he's arrived  
5 at these numbers; is that right?

6 A. It's how he arrived at the number  
7 of hours, yes.

8 Q. And if you look at -- for the first  
9 row, which is "Fact Investigation,"  
10 Mr. Goldberg explains that there are going to  
11 be three associates and two partners working  
12 on fact examination, right?

13 A. That is what it says.

14 Q. And he estimates that those  
15 lawyers, those five lawyers total, are going  
16 to be work 150 hours per month, correct?

17 A. That's what it says.

18 Q. For one month?

19 A. Um-hum.

20 Q. And he arrives at a lower estimate  
21 of lawyers at 750 by multiplying the five  
22 lawyers times 150 hours per month, right?

23 A. That is what I understood it to  
24 mean.

25 Q. And then he multiplies the

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2 750 hours times the blended rate of 800 to  
3 arrive at the \$600,000 lower reasonable  
4 estimate; is that right?

5 A. I think that's correct.

6 Q. That same formula in terms of  
7 multiplying the number of lawyers times the  
8 number of hours is carried forward on the next  
9 line, which is "Analysis and strategy" on  
10 "motion to dismiss," which is the fourth or  
11 fifth row down; do you see all that?

12 A. Um-hum.

13 Q. So you'd agree with me that on  
14 those tasks, the blended rate of \$800 an hour  
15 is being used regardless of whether the tasks  
16 are being accomplished by partners and  
17 associates?

18 A. Well, I can't say that I went  
19 through and did the math on each line item to  
20 have a factual opinion that what you just said  
21 is correct, but it seems to be that's what  
22 he's doing, yes.

23 Q. Without having done the math, as  
24 I've just done it, how did you determine that  
25 these entries were reasonable?

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2 A. It was my understanding that he was  
3 creating the number of hours by saying how  
4 he's going to staff it and multiplying it by  
5 the blended rate, which was apparently the way  
6 he chose to take into account the  
7 junior/senior ratio, and I went through and  
8 looked at these numbers. And I can't say that  
9 in each instance I took out my calculator and  
10 determined that he did the math correctly, but  
11 that was my understanding of how he was doing  
12 it. So if there's a math error in here,  
13 then -- if it was brought to my attention, I  
14 could comment on it.

15 Q. The blended rate of 800, that could  
16 be -- if I represented to you that that was a  
17 one-to-one ratio of associates to partners,  
18 would that be reasonable to you?

19 A. I would have to be persuaded that  
20 in those instances the work was appropriately  
21 divided on a -- basically on a 50/50 basis for  
22 me to conclude that it was reasonable.

23 Q. And if it was 67/33, same answer,  
24 you'd have to look at it?

25 A. Well, in order to express an

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2 opinion about any particular ratio, I'd have  
3 to look at it, but my level of skepticism  
4 might rise as the ratio was tilted more in  
5 favor of senior and less in favor of junior,  
6 but then certain projects might justify that  
7 and certain other ones might not. And so the  
8 particular project would bear on how I would  
9 feel about it as well.

10 Q. And you haven't done that work on a  
11 project-by-project basis in this case?

12 A. I have not because I was asked to  
13 assume that these were the facts.

14 Q. Okay. Do you have any knowledge  
15 one way or the other as to whether The Bank of  
16 New York has already engaged in some fact  
17 investigation in connection with the  
18 anticipated litigations?

19 A. I have -- I can only presume that  
20 they have done some because the case has been  
21 ongoing, but I can't help you with explaining  
22 the level of it, I don't know.

23 Q. Well, how do you determine how much  
24 time for fact investigation is reasonable when  
25 you don't know how much institutional

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2 knowledge the lawyers representing The Bank of  
3 New York already have on this case?

4 A. I'll give you two answers. One,  
5 Mr. Goldberg tells me that he took it into  
6 account. Number two, without having an actual  
7 complaint to look at, I wouldn't -- I'm not  
8 entirely sure what to say about it because  
9 it's hypothetical. So the reasonableness test  
10 is not here about the actuality of this. It's  
11 about whether it's hypothetically reasonable  
12 because that's all we have.

13 So, for instance, the extent to  
14 which a new complaint, if there is a new  
15 complaint, because I don't even know if there  
16 will be one, the extent to which a new  
17 complaint raises lots of issues that are not  
18 raised in the original complaint, that would  
19 certainly impact my thinking. I don't have a  
20 new complaint to look at.

21 Q. You said in your last answer that  
22 Mr. Goldberg tells me that he took it into  
23 account?

24 A. I believe it's in his report in a  
25 couple of places.

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2 Q. What did he take into account?

3 A. The benefit of the learning curve  
4 that people who had already been working on  
5 the case would have.

6 Q. You relied on Mr. Goldberg to make  
7 that assessment; is that correct?

8 A. I did.

9 Q. You did not take it upon yourself  
10 to make any assessment as to how much work had  
11 already been done by the lawyers representing  
12 Bank of New York over the last two and a half  
13 years?

14 A. I was not asked to do that and I  
15 did not do that.

16 Q. Mr. Goldberg says in his report in  
17 paragraph 39 if you want to take a look at it.

18 A. Okay.

19 Q. In the second sentence he says "The  
20 anticipated litigation is reasonably viewed as  
21 a serious threat to the core of the corporate  
22 trust business. The issues" --

23 A. Yes.

24 Q. "The issues raised in the  
25 anticipated litigation appear to be wide

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2 ranging and consequential." Do you see that?

3 A. I do.

4 Q. Is that consistent with your  
5 understanding of the seriousness of how Bank  
6 of New York views this case or views the  
7 anticipated litigations?

8 A. Yes.

9 Q. And it's your understanding that  
10 the complaints filed by Ambac and Whitebox  
11 against The Bank of New York have been pending  
12 since sometime in 2017, correct?

13 A. I believe that's right.

14 Q. Would you also agree with me that  
15 where a litigation -- where litigation is  
16 filed against The Bank of New York and that  
17 litigation is as serious as Mr. Goldberg says  
18 it is and as you have agreed, that there would  
19 be a significant amount of work from the day  
20 the action is filed to start looking at it  
21 very carefully, evaluating defenses, doing  
22 case assessment, doing it legal research,  
23 et cetera?

24 A. These sentences are about the  
25 anticipated litigation, which he doesn't know

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2 exactly what that's going to be, and I don't  
3 know exactly what that's going to be. How  
4 much work they did on the existing litigation  
5 and of how much benefit it will be with  
6 respect to the anticipated litigation can't  
7 really be answered factually. I don't know  
8 whether it's going to be largely the same  
9 allegations or substantively different  
10 allegations. And therefore all I was agreeing  
11 with was his analysis of the anticipated  
12 litigation. He didn't opine on, as near as I  
13 could tell, and I wasn't asked to opine on  
14 what was done by The Bank of New York in the  
15 existing litigation.

16 Q. What is your understanding of how  
17 the existing litigation differs from the  
18 anticipated litigation?

19 A. Well, I'm not sure how to describe  
20 how it will differ from anticipated litigation  
21 because I can't see what the anticipated  
22 litigation's actually going to be. But my  
23 understanding is there are -- there's a line  
24 drawn by the confirmation of the plan, which  
25 will release and eliminate certain kinds of

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2 claims and leave open for future disposition  
3 certain other kinds of claims. And the  
4 anticipated litigation, as I understand it,  
5 will be about those claims on the remaining  
6 side of the line and won't have anything to do  
7 with -- although I say that very loosely  
8 because there may be similar facts, I don't  
9 know, there may be similar conduct for those  
10 claims that are being released by virtue of  
11 confirmation on the plan.

12 Q. What kinds of claims were left open  
13 for future disposition; that's a quote from  
14 your answer?

15 A. I think they're described as gross  
16 negligence, willful misconduct and fraud, if I  
17 remember correctly.

18 Q. And what kind of claims are barred  
19 by the plan?

20 A. I'm not sure I remember the list as  
21 well as I do the ones that are going to be  
22 part of the anticipated litigation, but it's  
23 breach of contract, breach of fiduciary duty,  
24 negligence. That's what I remember  
25 specifically.

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2 Q. Let's take a look at paragraph 28  
3 of your declaration.

4 A. Okay.

5 Q. About six, seven lines down,  
6 there's a sentence that begins "Ambac alleges  
7 that BNYM is liable for failing to recognize  
8 events of default and failing to accelerate  
9 the senior bonds. Ambac asserts six causes of  
10 action for breach of fiduciary duty, breach of  
11 contract, breach of the implied covenant,  
12 gross negligence/breach of trust, declaratory  
13 judgment and injunctive relief. Ambac alleges  
14 that BNYM's conduct has caused Ambac to suffer  
15 millions of dollars in damages." Did I read  
16 that correctly?

17 A. You did.

18 Q. And one of those causes of action  
19 that I just read, as you describe them in your  
20 report, is for gross negligence, correct?

21 A. Correct.

22 Q. And gross negligence, as you  
23 acknowledge, is a claim that survives the  
24 plan, correct?

25 A. Yes.

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2 Q. You understand that the anticipated  
3 litigation includes Ambac's claim for gross  
4 negligence, right?

5 A. I understand that the  
6 anticipated -- the anticipated litigation  
7 might include claims for gross negligence,  
8 yes.

9 Q. So the gross negligence allegation  
10 that was filed in 2017 by Ambac and that  
11 Mr. Goldberg says is a threat to the core of  
12 the indenture business, correct?

13 MR. SOLOMON: Object to the form  
14 of the question.

15 A. I think his reference to a threat  
16 to the core of the business is a broader  
17 reference that incorporates more than just  
18 gross negligence.

19 Q. But it includes the gross  
20 negligence claim, correct?

21 A. I believe it includes it, yes.

22 Q. And so back to where we started a  
23 few minutes ago, would you agree with me that  
24 as soon as the Complaint was filed alleging  
25 gross negligence, that Bank of New York would

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2 start doing fact assessment and legal research  
3 and developing its defense right away?

4 A. I would agree that it is likely  
5 that they would do some of that, yes.

6 Q. And when you reviewed the estimated  
7 fees laid out by Mr. Goldberg, did you  
8 incorporate into what was reasonable or not  
9 reasonable any accounting for the prior work  
10 that was done?

11 A. I don't know what the prior work  
12 that was done is.

13 Q. Did you ask anyone?

14 A. I did not.

15 Q. Do you have an understanding one  
16 way or the other of what Reed Smith's fee  
17 arrangement is with The Bank of New York?

18 A. I really don't know what it is.

19 Q. And you haven't asked anyone?

20 A. I have not asked anyone.

21 Q. Do you know whether Reed Smith  
22 presented Bank of New York with a budget for  
23 the defense of the anticipated litigation?

24 A. I do not know that.

25 Q. Have you asked for it?

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2 A. No.

3 Q. If Reed Smith had actually prepared  
4 and presented to The Bank of New York a budget  
5 for the anticipated litigation, would you  
6 consider that to be a more realistic predictor  
7 of the actual legal fees to be incurred than  
8 the hypothetical estimate in the Goldberg  
9 declaration?

10 A. I guess in order to answer that I'd  
11 have to see the budget that they prepared in  
12 order to determine if it was more or less  
13 reasonable.

14 Q. Are you aware of any distinction  
15 made by Mr. Goldberg between the Ambac side of  
16 the anticipated litigation versus the Whitebox  
17 side?

18 A. I am not recalling any significant  
19 difference.

20 Q. So is it your understanding that  
21 if -- let's just say hypothetically that  
22 Whitebox would settle out tomorrow and only  
23 the Ambac litigation was going forward -- you  
24 following me through that hypothetical? How  
25 would Mr. Goldberg's estimates change?

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2 A. Well, I'm not sure I can tell you  
3 how Mr. Goldberg would change his estimates.  
4 He'd have to tell you that.

5 Q. Would the assessment of the  
6 reasonableness of his assessments change if  
7 that were the case?

8 A. Well, I would assume that he would  
9 provide me with new material based on the  
10 changed circumstances, which either would  
11 change his adjustment -- change his assessment  
12 or wouldn't, and that at the time I would read  
13 what he proposed and I would be able to react  
14 to whether it changed my view of the  
15 reasonableness of his assessment.

16 Q. If there were one plaintiff versus  
17 two, would you expect that to change the  
18 estimates in the Goldberg report?

19 A. You know, I'm not sure because  
20 claims that are extremely similar are made by  
21 one party versus that are made by two parties,  
22 I'm not sure how much that changes the fire  
23 drill. It might change it somewhat because if  
24 party A is not asserting claims, then  
25 certainly there's some -- some discovery that

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2 wouldn't need to be done because party A isn't  
3 involved anymore. But the underlying proof of  
4 the issues might still implicate party A and  
5 its behavior and its allegations at the time,  
6 and so it's also possible that it would  
7 largely be unchanged.

8 But then I don't have the benefit  
9 of saying party A's anticipated litigation or  
10 party B's anticipated litigation, and so I  
11 don't know how similar they are or how unique  
12 they are.

13 Q. Mr. Goldberg estimates a range of  
14 25- to \$40 million for the anticipated  
15 litigations, correct?

16 A. That's what I recall.

17 Q. If his estimate had been 25- to  
18 50 million instead of 25 to 40, such that the  
19 upper range of his estimate had been increased  
20 by that proportionate amount, would you have  
21 found that to be reasonable?

22 A. Well, I don't think I can really  
23 answer your question.

24 Q. Why not?

25 A. I'll tell you. He provides on

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2 his -- I guess it's Goldberg Exhibit 2 an  
3 explanation of what adjustment he made to go  
4 from the lower estimate to the higher  
5 estimate. If he raised his estimate by  
6 \$10 million, I presume he would provide me  
7 with an explanation of why he chose that  
8 larger number. And then when I read that  
9 explanation I would be in a position to say  
10 that makes sense to me or that doesn't make  
11 sense to me.

12 Q. Okay. Let's take it on a line item  
13 basis. Let's look, again, at fact  
14 investigation, which is the first line.  
15 Explain to me, as you understand it, the  
16 difference between the low end and the high  
17 end of that estimate.

18 A. Just appears to be a longer period  
19 of time.

20 Q. What is the difference between the  
21 two periods of time?

22 A. One month to two months, I believe.

23 Q. So if the high end hadn't been two  
24 months, but two and a half months, would you  
25 have found that to be reasonable?

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2 A. I'm not sure. I certainly would  
3 accept the notion that as the number gets  
4 bigger, the likelihood that I question it gets  
5 higher, but that's without the benefit of any  
6 explanation. And an important -- to me, an  
7 important part of the reasonableness of a  
8 budget is the extent to which it controls the  
9 ultimate amount of fees that are paid. And so  
10 if we were talking about a budget which once  
11 established meant you'd get paid that amount,  
12 then the budget is a more important factor in  
13 the consideration.

14 But if the fees that are ultimately  
15 going to be earned are themselves going to be  
16 subject to not a pre-performance hypothetical  
17 analysis, but a post-performance actual  
18 analysis and you sort of have a fail safe in  
19 the sense that if you took two and a half or  
20 three months to do that investigation and you  
21 couldn't explain why you needed to do that,  
22 then that might cause me to find those actual  
23 services to be unreasonable. It's a lot  
24 harder to talk about what's an unreasonable  
25 amount of time to investigate a hypothetical

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2 complaint because I don't know what it says.

3 And that makes it a much more challenging  
4 prospect.

5 Q. Well, you do know to some extent  
6 what it says, right, because the Complaint  
7 that you reviewed alleges gross negligence and  
8 the complaint that will be filed in the  
9 anticipated litigation will also allege gross  
10 negligence, right?

11 A. Well, if you're telling me that the  
12 new complaint is going to say the same thing  
13 that the old one did and nothing more, that  
14 would help me with that issue. If you're  
15 telling me that the new complaint will include  
16 something that was in the old complaint, but  
17 might or will have all kinds of other things  
18 in it, that becomes, to me, a much less  
19 important question you've asked.

20 Q. So if you don't know what the new  
21 complaint is going to say, how do you  
22 determine if anything is going to be  
23 reasonable or unreasonable?

24 A. Well, it's difficult, but what I  
25 was asked to do was not figure that out for

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2 myself, but take what Mr. Goldberg told me was  
3 going to be the likely contents of that  
4 complaint and the likely staffing in order to  
5 address that complaint and determine if his  
6 assessment was reasonable.

7 So I'm not actually making an  
8 assessment of the anticipated complaint  
9 because I don't know what it's going to say.  
10 I'm making an assessment of his assessment of  
11 that complaint. And I thought -- I thought  
12 that he gave a thorough analysis of why he  
13 reached the conclusions that he did. People  
14 could disagree with it. I didn't particularly  
15 disagree with it.

16 Q. Your assessment of reasonableness  
17 is based on the description given to you by  
18 Mr. Goldberg of the anticipated litigation?

19 A. Yes, that's what I was asked to do.

20 Q. What was that description?

21 A. Well, I think I lay it out. It --  
22 the anticipated litigation description that he  
23 gave me was about what services would be  
24 likely used to respond to the Complaint and  
25 the various component parts of it and who

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2 would perform the services and how much they  
3 would charge.

4 And he didn't so much tell me what  
5 the anticipated litigation complaint was going  
6 to say because I don't -- I doubt if he knows.  
7 I certainly don't know what the allegations of  
8 that anticipated complaint are going to be, so  
9 we're all hamstrung by dealing with a  
10 hypothetical set of claims. No one -- you  
11 guys maybe, but nobody reading pieces of paper  
12 that are available to the public knows what  
13 this subsequent complaint is going to say. We  
14 might be able to guess, but we don't know.

15 Q. Again, I don't mean to argue with  
16 you, but I'm struggling with what anchors you  
17 to any assessment to reasonableness when  
18 there's an entire universe of possibility in  
19 terms of what could be in the anticipated  
20 litigation? What anchors you to some  
21 assessment of reasonableness?

22 A. Well, I'm not sure there's an  
23 entire universe. We know the three things  
24 that survived the confirmation on the plan.  
25 Mr. Goldberg has made an assessment based on

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2 his extensive experience in handling what I'll  
3 call comparable cases about what he thinks it  
4 likely could cost to deal with these kinds of  
5 issues. And I was asked to rely on that. And  
6 so rather than substitute my judgment for his  
7 about an area that he has more expertise than  
8 I do, I relied on his assessment and looked at  
9 it and said this appears to be reasonable  
10 based on what we know.

11 Q. Okay. So within the parameters of  
12 Mr. Goldberg's assumptions, which have been  
13 adopted by you, and we look at the -- the  
14 amount of time Mr. Goldberg estimates for a  
15 fact investigation, which is the first row on  
16 Goldberg Exhibit 2, and Goldberg says the low  
17 end of the range is 750 hours, which is what  
18 he says is one month of work. The high end of  
19 the range is 1500 hours, which he says is two  
20 months of work. It's double. It could be one  
21 month, it could be two, right?

22 A. Yeah.

23 Q. Okay. And I'm saying if Goldberg  
24 had written that it might be one month, might  
25 be two and a half months, would you deem that

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2 reasonable?

3 A. All I can say is I might because  
4 I'd have to -- I'd have to look at the rest of  
5 the budget. If that's the only thing that  
6 changed, it might not affect my opinion very  
7 much. If every single thing moved like that,  
8 it might start to cause me to -- to question  
9 it. So you've pick one line item and you've  
10 moved it up a few dollars in a 25- to  
11 \$40 million thing, so maybe you've caused it  
12 to now be 25.5 to 40.5, I don't know how  
13 excited I'd get about that.

14 When you asked me about going from  
15 40 to 50, I said I'd have to read his  
16 justification for that additional time before  
17 I could decide if I thought it was reasonable  
18 or not.

19 Q. Let's go down a line. This is for  
20 "Analysis and strategy." You see that?

21 A. I do.

22 Q. The low end of the range is 360  
23 hours, which he estimates is six lawyers  
24 working two weeks?

25 A. I don't think that's what that

1 ROBERT M. FISHMAN (1/10/19)

2 says.

3 Q. You're right. Three partners  
4 working one week and three associates working  
5 two weeks?

6 A. I believe that's what it says.

7 Q. Okay. And the high range is three  
8 partners working two weeks and three  
9 associates working three weeks, right?

10 A. Right.

11 Q. And if the three associates had  
12 instead of in the high range been estimated to  
13 work three weeks, but four, how would you make  
14 a determination as to whether that's  
15 reasonable? What methodology would you use to  
16 determine whether that's reasonable?

17 A. You know, there's no science to the  
18 way you do this. I would not -- I would not  
19 propose to you that there is science where you  
20 can look at something and you can say this is  
21 reasonable and this is unreasonable by  
22 definition. It is how does it appear in the  
23 overall context of the discussion. And there  
24 is no point where it is by definition no  
25 longer reasonable. And it's just a matter of

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2 using your experience to try to recognize  
3 something that doesn't make sense to you.

4 Q. Okay. What you just said, that's  
5 true on the low end of the range as well,  
6 right?

7 A. I suspect it is because it's still  
8 just an assessment of hypothetical litigation.

9 Q. Let's look at paragraph 5 of your  
10 declaration.

11 A. Yep.

12 Q. You say here that "One of the  
13 principal unresolved issues and the issue that  
14 this report will address is the amount of  
15 funds that the trustee is entitled to  
16 reserve" -- and you define that as, quote,  
17 "reserve funds," end quote -- "from funds  
18 otherwise distributable to beneficial holders  
19 of the bonds." Did I read that correctly?

20 A. I believe you did.

21 Q. Is it your understanding that a  
22 holdback from distribution is the only method  
23 of providing security to The Bank of New York  
24 in this case?

25 A. It is my understanding that 19.5

1 ROBERT M. FISHMAN (1/10/19)

2 provides for the possibility of at least two  
3 approaches.

4 Q. Okay. What's the second one?

5 A. I don't have it in front of me to  
6 be precise, but I think it's the posting of a  
7 bond or other collateral.

8 Q. And if a bond is posted for the  
9 benefit of Bank of New York, would you still  
10 hold to your assessment that -- withdrawn.  
11 Strike that.

12 Your report does not contemplate  
13 the posting of a bond, correct?

14 A. I don't specifically mention that,  
15 no.

16 Q. Is there any particular reason why  
17 you ignored that facet of Section 19.5?

18 MR. WELCH: Object to the form.

19 A. I guess I viewed the topic as being  
20 more about the amount and less about the  
21 vehicle. And because no particular bond  
22 proposal was put forth for me to look at, I  
23 didn't really have anything to say about that  
24 whereas the reserve fund, I could understand  
25 what was being contemplated. You take money

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2 and you put in a basket and you hold it, and  
3 so I understand that. I think the math  
4 applies similarly, probably identically, in  
5 both contexts, the value piece.

6 Q. In paragraph 38 of your  
7 declaration, you say "The reserve fund needs  
8 to have an amount in it that will cover all of  
9 the potential costs to BNYM from the  
10 anticipated litigation."

11 A. I'm trying to find that.

12 Q. That's about ten lines down.

13 A. Got it. I don't know why I was  
14 being so obtuse, but I found it.

15 Q. Okay. If the Plaintiffs or one of  
16 them in the anticipated litigation were to  
17 bond as opposed to have the security provided  
18 to Bank of New York through a holdback, but  
19 were to bond successive stages of litigation,  
20 all right, you would agree with me that the  
21 bond required at the beginning of the case  
22 would not need to cover all of the potential  
23 costs of the Bank of New York over the course  
24 of the litigation?

25 A. I'm not sure just exactly what I

1 ROBERT M. FISHMAN (1/10/19)

2 would agree with. There were a lot of parts  
3 to that question. If you want me to express  
4 an opinion about how a bond might fit into  
5 this story, I would need to know everything  
6 about that bond. I would need to know who's  
7 posting it, what's it posted for, what does it  
8 take to get it, what conditions are there, how  
9 long does it last. I mean, there's a lot of  
10 questions that I would have before I would be  
11 able to say this bond is just like cash.

12 Q. And if it were a cash bond, how  
13 would that change your answer?

14 A. Again, I'd need to read the  
15 document that governs access to it because  
16 there are bonds that you get by touching a  
17 button and there are bonds you get by engaging  
18 in a fight with somebody over whether you're  
19 entitled to it or not. And the two are not in  
20 my mind identical in any way.

21 MR. HERTZBERG: We've been going a  
22 little over an hour. Let's take a  
23 break.

24 (Whereupon, at this time, a short  
25 break was taken.)

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2 BY MR. HERTZBERG:

3 Q. Mr. Fishman, let me call your  
4 attention, please, to Goldberg Exhibit 2 and  
5 specifically to the line item relating to the  
6 motion to dismiss.

7 A. Okay.

8 Q. You reviewed that line item,  
9 correct?

10 A. I did.

11 Q. And you deemed it reasonable?

12 A. I did.

13 Q. And in the "Explanation" section,  
14 Mr. Goldberg explains that he would, for the  
15 briefing, estimate 450 associate hours. Do  
16 you see that?

17 A. I see that.

18 Q. Do you have any sense of the  
19 methodology behind how Mr. Goldberg arrived at  
20 that number?

21 A. No.

22 Q. I'll represent to you that earlier  
23 today Mr. Goldberg testified he initially  
24 estimated that number to be 480 hours, but he  
25 knocked 30 hours off for a particular reason.

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2 Is this the first time you're hearing that?

3 A. Yes.

4 Q. Mr. Goldberg never told you that he  
5 knocked 30 hours off of that number?

6 A. I never talked to Mr. Goldberg.

7 Q. Did anybody ever tell you that he  
8 knocked 30 hours off?

9 A. No.

10 Q. Do you know why he knocked 30 hours  
11 off?

12 A. No.

13 Q. I want to ask you some questions  
14 about the prior litigation that has already  
15 taken place between Ambac and Whitebox, on the  
16 one hand, and The Bank of New York on the  
17 other.

18 A. Okay.

19 Q. Are you aware that there has been  
20 litigation between the parties relating to the  
21 matters that bring us here today?

22 A. Yes.

23 Q. And what have you reviewed from the  
24 Court filings in connection with that  
25 litigation?

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2 A. I looked at the Whitebox complaint.

3 I looked at the Ambac complaint. And I looked  
4 at the interpleader action.

5 Q. When you say you looked at the  
6 interpleader action, did you look at the  
7 interpleader complaint?

8 A. Yes, I'm sorry, the interpleader  
9 complaint. That's what I meant to say.

10 Q. The complaint filed by The Bank of  
11 New York?

12 A. Right.

13 Q. And are you aware whether there's  
14 been any motion practice in the context of the  
15 interpleader action?

16 A. I believe there's been some. I'm  
17 not sure I can be pre- -- off the top of my  
18 head I don't know that I could be precise  
19 about exactly what it was.

20 Q. Are you aware there were summary  
21 judgment motions filed?

22 A. Yes, I am aware of that.

23 Q. Did you review the summary judgment  
24 papers?

25 A. I did not.

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2 Q. Are you aware that there was  
3 discovery among the parties?

4 A. I'm aware that there was some  
5 discovery, yes.

6 Q. Are you aware of the volume of the  
7 discovery?

8 A. No.

9 Q. Are you aware of whether Bank of  
10 New York made requests for production to  
11 various parties?

12 A. I believe they did, but I couldn't  
13 be specific about to whom or for what.

14 Q. Did you review those requests for  
15 production?

16 A. I did not.

17 Q. Are you aware of whether The Bank  
18 of New York responded to requests for  
19 production from various parties including  
20 Ambac?

21 A. I'm not specifically aware one way  
22 or the other.

23 Q. Are you aware of whether Bank of  
24 New York internally collected documents for  
25 the review of its counsel?

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2 A. I don't know.

3 Q. Are you aware of whether Bank of  
4 New York produced documents to other parties?

5 A. I'm not certain.

6 Q. Are you aware of how much time Bank  
7 of New York and its counsel spent reviewing  
8 document productions made by parties in the  
9 interpleader action?

10 A. No.

11 Q. Are you aware of whether Bank of  
12 New York performed some case assessment with  
13 respect to the Ambac and Whitebox complaints?

14 A. I'm not specifically aware,  
15 although I assume they did.

16 Q. Are you aware of how many hours  
17 were spent by Reed Smith in connection with  
18 that case assessment?

19 A. No.

20 Q. Are you aware of whether Reed Smith  
21 has identified legal defense on behalf of the  
22 Bank of New York in connection with the events  
23 of default alleged by Ambac and Whitebox?

24 A. I'm not specifically aware, no.

25 Q. Are you aware of how many hours

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2 were spent by Reed Smith in the identification  
3 and development of those legal defense?

4 A. No.

5 Q. Are you aware of how many hours  
6 were spent by Reed Smith in the drafting of  
7 summary judgment papers?

8 A. No.

9 Q. Are you aware of how many hours  
10 were spent by Reed Smith in responding to  
11 other parties' summary judgment papers?

12 A. I am not.

13 Q. Are you aware of how the Goldberg  
14 estimate takes into account all of the work  
15 that was performed by Reed Smith on behalf of  
16 Bank of New York in the interpleader action?

17 A. Mathematically I'm not aware of it.  
18 I know he says he did.

19 Q. Do you know how much Reed Smith has  
20 billed to Bank of New York to date in  
21 connection with the Ambac and Whitebox  
22 actions, including the interpleader  
23 litigation?

24 A. No.

25 Q. Have you asked?

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2 A. No.

3 Q. When assessing the reasonableness  
4 of the time and cost estimates of  
5 Mr. Goldberg, how did you factor in your own  
6 mind the prior work that had been done by  
7 Reed Smith on behalf of Bank of New York in  
8 connection with the Ambac and Whitebox  
9 actions?

10 A. I guess the only thing I could say  
11 about that is it's not clear to me the extent  
12 to which the anticipated litigation is going  
13 to be the same as the existing litigation, be  
14 similar to the existing litigation or be  
15 completely different than the existing  
16 litigation. And, therefore, it's very hard to  
17 assign a value to the work that's already been  
18 done when you're asked to assign that value in  
19 conjunction with a case that you don't know  
20 what it's going to say.

21 Q. So in that case, are you  
22 effectively, when assessing reasonableness,  
23 assuming that Reed Smith is starting from  
24 zero?

25 A. No, I don't think I'm assessing it

1 ROBERT M. FISHMAN (1/10/19)

2 that way because I believe Mr. Goldberg made  
3 clear that he took into account some benefit  
4 of prior knowledge.

5 Q. It's totally unquantified, correct?

6 A. I can't quantify it.

7 Q. Does he quantify it?

8 A. I don't know that he quantifies it  
9 in his report. He may or may not be able to  
10 quantify it. I don't know that.

11 Q. You don't know whether he  
12 quantifies it in his report?

13 A. No, I said I don't believe it is  
14 quantified in his report, not in a way I can  
15 point to. But he may be capable of  
16 quantifying it. I just don't know the answer  
17 to the question.

18 Q. You're not capable of quantifying  
19 it, correct?

20 A. How he took it into account, no,  
21 I'm not capable of quantifying how he took it  
22 into account.

23 Q. And you haven't attempted to  
24 quantify how he took it into account?

25 A. I have not.

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2 Q. Mr. Goldberg estimates part of the  
3 investment to be made by Reed Smith in the  
4 defense of Bank of New York that there would  
5 be a number of interviews that would have to  
6 be conducted. Do you recall that?

7 A. Yes.

8 Q. Do you recall how many interviews  
9 Mr. Goldberg estimated would have to be  
10 conducted?

11 A. I don't off the top of my head  
12 recall.

13 Q. If I represented to you that it  
14 would be 40, would that refresh your  
15 recollection?

16 A. I remember 40 is a number relating  
17 to depositions, but I'm not sure that it  
18 relates to interviews. I don't know if you're  
19 meaning to differentiate between interviews  
20 and depositions.

21 Q. Let's take depositions. Thank you  
22 for the correction. Mr. Goldberg estimates 40  
23 depositions. How did you make any assessment  
24 of reasonableness as to whether 40 was high,  
25 low, just right?

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2 A. Well, the possibility of there  
3 being fraud allegations in the anticipated  
4 litigation raises -- to me raises a lot of  
5 complicated fact issues. And that means  
6 there's a lot of people who may or may not  
7 have information relative to the kinds of  
8 proofs that you need in a fraud case. And so  
9 I don't really find it particularly surprising  
10 that someone would estimate that it might take  
11 40 people to consider all of the people  
12 involved at the Plaintiffs, at the Defendants,  
13 at third parties, at governmental entities.  
14 That number doesn't really strike me as  
15 particularly surprising.

16 Q. A fraud is a material  
17 misrepresentation, correct?

18 A. It can be.

19 Q. Okay. A fraud can be committed by  
20 a single person, right?

21 A. It's possible for a fraud to be  
22 committed by a single person, yes.

23 Q. A fraud can be committed by a  
24 single person on the defense side to a single  
25 person on the plaintiff side, right?

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2 A. That is possible, yes.

3 Q. Do you have any reason to believe  
4 in this case that if there were a fraud  
5 allegation, there would be two witnesses to  
6 that fraud, to that act of fraud?

7 A. I do not have any reason to believe  
8 that that is specifically true in this  
9 instance.

10 Q. You don't know one way or the  
11 other?

12 A. I don't. I don't have any idea  
13 what the allegations are.

14 Q. The number of witnesses to the  
15 fraud could be two, correct?

16 A. Could be.

17 Q. Could be a number greater than two,  
18 correct?

19 A. Yes.

20 Q. So how do you make any assessment  
21 as to the number of relevant witnesses for  
22 deposition is 40?

23 A. Mr. Goldberg makes the assessment  
24 that it's 40 and I was asked whether I thought  
25 that was an unreasonable assessment or a

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2 reasonable assessment. And since all I have  
3 to work with is the hypothetical of the  
4 anticipated case and while I guess it's  
5 possible that this fraud is a two-person  
6 fraud, I guess it's equally possible that it's  
7 a 200-person fraud and 40 therefore seemed  
8 like a reasonable number to pick about an  
9 unknown fraud alleged to have been done in an  
10 unknown way.

11 Q. And because of those unknowns,  
12 there's a universe of possibilities as to the  
13 numbers of witnesses that could be required to  
14 prove the claim of fraud or the defense to  
15 fraud, correct?

16 A. I certainly can't tell you how many  
17 witnesses it will take to prove and/or defend  
18 the unknown claim of fraud.

19 Q. You can't tell me with any degree  
20 of certainty how many witnesses there could be  
21 to that claim?

22 A. I don't know what the complaint is  
23 going to say.

24 Q. So the number 40 is as good an  
25 estimate as 20, 60 or a hundred, correct?

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2 A. No, I don't think I would agree  
3 with that.

4 Q. Why not?

5 A. If it said two, I'd be surprised.  
6 If it said 200, I'd be even more surprised.  
7 And so I'm trying to imagine a hypothetical  
8 story. And in a hypothetical story, 40 seems  
9 like the kind of number -- if it said 35  
10 versus 40, I don't think I would have had any  
11 different kind of reaction to it. If it said  
12 50 instead of 40, I might not have had a  
13 different reaction to it. But if it had said  
14 two or three or 200 or 300, I might have had a  
15 different reaction to it. But, again, without  
16 having an actual complaint to review to see  
17 actual allegations about who did what to who,  
18 it's impossible to have an actual right  
19 answer. I guess that's why it's an estimate.

20 Q. I may be in a position to pass the  
21 witness I'm just taking a last look,  
22 particularly a look at paragraph 69, please,  
23 of the Goldberg.

24 A. Okay.

25 Q. Mr. Goldberg states in paragraph

1 ROBERT M. FISHMAN (1/10/19)

2 69, "The trial counsel may have to analyze  
3 certain legal and factual issues, including  
4 jurisdiction, standing, venue, removal,  
5 sufficiency of process, et cetera." Do you  
6 see that?

7 A. I do.

8 Q. Did you form any opinion as to  
9 whether those were viable issues to be  
10 addressed in the anticipated litigation or did  
11 you rely entirely on Mr. Goldberg's  
12 assessment?

13 A. Well, I would say I mostly relied  
14 on his assessment, but I did give some  
15 consideration to where is the case being filed  
16 and who's filing it and are there issues that  
17 can challenge their right to file it in a  
18 place or their right to file it at all. And  
19 while I don't know enough about the underlying  
20 dispute to say that I have an opinion that  
21 those issues are, in fact, present, I don't --  
22 I certainly don't have any problem imagining  
23 the possibility of those kinds of issues  
24 arising in the context of this litigation.

25 Q. So did you make a determination

1 ROBERT M. FISHMAN (1/10/19)

2 that standing could be an issue in the -- in  
3 the anticipated litigation?

4 A. I did not make an independent  
5 determination that standing was an issue, but  
6 in the context of preparing the report, I saw  
7 and/or spoke about that as a possible issue.

8 Q. You spoke about that with who?

9 A. With counsel.

10 Q. At Reed Smith?

11 A. Yes.

12 Q. You had a conversation with  
13 Reed Smith about standing?

14 A. Not specifically about the merits  
15 of standing, but about the identification of  
16 issues that could arise.

17 Q. Did you make an assessment that  
18 standing -- and I'm just taking an example  
19 from paragraph 69, that standing is an issue  
20 that could arise in the anticipated  
21 litigation?

22 A. I didn't make an independent  
23 assessment that there are grounds for a  
24 standing dispute. I made an assessment that  
25 it is possible that that issue could arise.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. About what fact did you make that  
3 assessment that that issue could arise?

4 A. I was just told that it could  
5 arise.

6 Q. You were told that; you didn't make  
7 an assessment of it?

8 A. I said I did not make an  
9 independent assessment of whether there's a  
10 valid standing argument. I was advised that  
11 there might be a standing argument.

12 Q. And Reed Smith advised you of that?

13 A. Yes.

14 Q. What about venue, did you make an  
15 independent assessment as to whether there are  
16 venue issues in the anticipated litigation?

17 A. Where is the anticipated litigation  
18 filed? Because I can't really direct myself  
19 to venue if I don't know where it's filed,  
20 which is the only way I could know if maybe it  
21 should have been filed somewhere else.

22 Q. What about sufficiency of process,  
23 is that --

24 A. I don't think I -- I don't think I  
25 gave particular consideration to that issue.

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2 I don't recall. I don't recall it.

3 Q. What about jurisdiction, did you  
4 make any assessment as to whether jurisdiction  
5 was an issue that would require analysis in  
6 the anticipated litigation?

7 A. I didn't make my own analysis of  
8 that, no. I can imagine jurisdiction as a  
9 potential issue depending on who files what  
10 where. What Court they're asking to address  
11 it and I can imagine that some Courts have the  
12 right to address that issue and other Courts  
13 might not have the right to address that  
14 issue, or at least an argument could be made  
15 that they don't.

16 MR. HERTZBERG: All right. I'll  
17 pass the witness. Thank you.

18 THE WITNESS: You almost did  
19 something I've never seen before. You  
20 said you might pass the witness and  
21 you did it without asking another  
22 question, which never happens.

23 EXAMINATION BY

24 MR. WELCH:

25 Q. Good afternoon. My name is

1 ROBERT M. FISHMAN (1/10/19)

2 Trevor Welch with Kasowitz Benson for  
3 Whitebox.

4 You said you were retained in  
5 December?

6 A. Yes.

7 Q. And you received a draft of  
8 Mr. Goldberg's declaration sometime in  
9 December?

10 A. Yes.

11 Q. Was it different from the final one  
12 that has been filed in this case?

13 A. Yes, it was somewhat different.

14 Q. Did you give any pushback or  
15 comments on Mr. Goldberg's draft declaration?

16 A. No, I did not.

17 Q. Did you in any way communicate with  
18 Mr. Goldberg in your review of the draft  
19 declaration?

20 A. No, I did not.

21 Q. What purpose were you given a draft  
22 declaration?

23 A. I'm not sure what the purpose was.  
24 I guess to give me a running start at what he  
25 might be saying so that I could get a running

1 ROBERT M. FISHMAN (1/10/19)

2 start on what I might be saying.

3 Q. And you indicated that you began  
4 drafting your report before you had even  
5 gotten Mr. Goldberg's declaration; is that  
6 right?

7 A. Before I got the final one, yes.

8 Q. And then you get the declaration,  
9 and then what, what did you do?

10 A. Well, those days all run into each  
11 other. I'm not sure that I could specifically  
12 tell you what day I did which thing when we're  
13 talking about a total of about ten days in  
14 which I did a lot of things. I'm not sure.  
15 I'm not sure I can -- I'm not sure I can  
16 really give you a meaningful answer to that.

17 Q. You use the figure "ten," ten days?

18 A. I made up ten days. It might have  
19 been 12, 13, it might have been nine. All I  
20 know is I spent two weeks in Florida on a  
21 vacation in which I didn't do very much  
22 vacationing.

23 Q. Instead what you focused on was  
24 crafting your expert report in this case?

25 A. That was the lion's share of the

1 ROBERT M. FISHMAN (1/10/19)

2 work that I did when I was supposed to be on  
3 vacation, yes.

4 Q. Well, I want to understand what the  
5 work is that you did?

6 A. Okay.

7 Q. You read Mr. Goldberg's report?

8 A. That's one of the things that I  
9 did.

10 Q. What else did you do?

11 A. I read a variety of pleadings that  
12 were sent to me. I read some Court orders. I  
13 read some plan provisions. That probably is a  
14 pretty fair description of what I looked at.

15 Q. What did you do that the Court  
16 can't do for itself?

17 A. What did I do that the Court can't  
18 do for itself? I don't know what the Court  
19 can do for itself. I guess I don't know how  
20 to answer that question.

21 Q. You intend to offer an expert  
22 opinion in this matter?

23 A. I think that's the intent, yes.

24 Q. Do you believe your opinion will  
25 assist the Court as the trier of fact in

1 ROBERT M. FISHMAN (1/10/19)

2 making certain determinations in the matter?

3 A. I certainly believe it has the  
4 possibility of assisting the Court. I guess  
5 the Court will have to decide if it's of any  
6 assistance.

7 Q. What's the assistance you imagine  
8 your report will give the Court?

9 A. A reflection on the reasonableness  
10 of the assessment of the potential costs and  
11 the protections that are afforded to the  
12 Plaintiffs under that scenario.

13 Q. But you didn't do any independent  
14 assessment of those issues, right?

15 A. I didn't do an independent  
16 assessment of the costs. I relied on  
17 Mr. Goldberg's assessment and I looked at it  
18 to determine if I thought it was reasonable.

19 Q. Okay. So you did an assessment of  
20 Mr. Goldberg's assessment?

21 A. In a manner of speaking.

22 Q. Anything else?

23 A. Well, I -- Mr. Goldberg's  
24 assessment isn't -- I didn't rely on  
25 Mr. Goldberg's assessment in discussing the

1 ROBERT M. FISHMAN (1/10/19)

2 protections that would be available to the  
3 Plaintiffs in the event that the reserve fund  
4 is funded and an amount of money is put in it  
5 that exceeds the amount of the fees that are  
6 ultimately allowed to -- using the word  
7 "allowed" loosely, allowed to with The Bank of  
8 New York.

9 Q. Okay. Do you think that the Court  
10 is capable of evaluating Mr. Goldberg's  
11 assessment of the potential fees in this case?

12 A. I don't really have an opinion  
13 about what the Court is capable of doing.

14 Q. What is it that you think you've  
15 done that the Court can't do by simply reading  
16 Mr. Goldberg's declaration?

17 A. Well, I didn't say that I did  
18 something that the Court can't do. I imagine  
19 that the Court might be interested in someone  
20 who is familiar with and has experience in  
21 looking at fees in the context of insolvency  
22 cases and expressing an opinion about the  
23 topic. And if the Court doesn't find it  
24 helpful, then the Court won't pay attention to  
25 it.

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2 Q. You don't have experience in doing  
3 estimates, do you, sir?

4 A. I don't have experience in doing an  
5 estimate of fees for this case or a case  
6 exactly like this, no, I don't.

7 Q. How about any case?

8 A. Sure, I've done lots of budgets in  
9 my career.

10 Q. You made a distinction between  
11 looking at pre-performance estimates and  
12 post-performance analysis?

13 A. Those are two different things, but  
14 that's not the same as doing a budget.

15 Q. So here do you agree with me what  
16 Mr. Goldberg has done is a pre-performance  
17 estimate of fees?

18 A. I certainly agree with that.

19 Q. And what you as a fee examiner have  
20 done professionally is a post-performance  
21 analysis of actually billed fees?

22 A. That is certainly one of the things  
23 I have done as a fee examiner.

24 Q. So what, if anything, have you done  
25 that qualifies you to evaluate Mr. Goldberg's

1 ROBERT M. FISHMAN (1/10/19)

2 pre-performance estimate of fees?

3 A. For instance in the Petters' case,  
4 we use budgets in the Petters' case and did  
5 from 2016 through the current time period.  
6 And every professional submits to me a  
7 quarterly budget that sets forth their best  
8 guess about what they're going to do for the  
9 next quarter going forward. So I have looked  
10 at many budgets in that context.

11 I have prepared my own budgets for  
12 litigation over time, including as recently as  
13 submitting budgets in the Toys "R" Us case  
14 because the U.S. Trustee guidelines require  
15 that. So I have -- I have some familiarity  
16 with the concept of trying to project what  
17 litigation is going to look like or what legal  
18 proceedings is going to look like. It isn't  
19 always litigation.

20 Q. Some familiarity. What else  
21 besides what you've just described? What  
22 other experience do you have?

23 A. I'd be hard pressed to list the  
24 name of every case I ever submitted a budget  
25 for, but there's more than a few.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. Well, can you quantify; five?

3 A. More than five.

4 Q. Any cases comparable to this?

5 A. No, I don't think I have ever  
6 myself handled a piece of litigation  
7 comparable to this. It's not what I do.

8 Q. Your opinion is wholly derivative;  
9 isn't that true?

10 A. No, I don't think it is.

11 Q. If Mr. Goldberg's opinion was  
12 stripped out of this case, let's imagine there  
13 was no declaration being submitted by  
14 Mr. Goldberg, what could you offer the Court?

15 A. Well, I wouldn't be able to create  
16 the assessment that Mr. Goldberg has created  
17 for the entirety of the case because I don't  
18 have a level of familiarity with handling that  
19 kind of litigation. That's why I was asked to  
20 make assumptions based on what he produced.

21 Q. So it's something you're not  
22 capable of doing?

23 A. That particular thing I would not  
24 be able to do on my own. I probably, given  
25 enough time, could have collected up a group

1 ROBERT M. FISHMAN (1/10/19)

2 of people and done that assessment, but I  
3 didn't have enough time to do that and  
4 therefore wasn't a choice.

5 Q. So you didn't do that?

6 A. I absolutely didn't do that.

7 Q. So apart from reviewing  
8 Mr. Goldberg's opinion and opining that you  
9 think it was reasonable, based on the  
10 experience you've described, what is it that  
11 you did to offer your opinion?

12 A. I also provided my view on the  
13 reasons why the reserve fund approach was a  
14 reasonable approach to protect the interests  
15 of all of the litigants.

16 Q. Okay. Anything else?

17 A. No, not so much. I think that's, I  
18 think, the two principal things that I  
19 expressed an opinion about.

20 Q. You expressed an opinion on the  
21 reasonableness of Mr. Goldberg's opinion?

22 A. Of his assessment.

23 Q. So you did an assessment of his  
24 assessment?

25 A. You could call it that I guess.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. An assessment that you don't have  
3 an independent basis to make?

4 A. I would not be making an  
5 independent assessment of the management of  
6 the litigation of this sort.

7 Q. Right, because you don't have the  
8 experience to do that?

9 A. I don't, although I do have the  
10 experience to read other people's assessments  
11 of their cases because I do that all the time  
12 as a fee examiner.

13 Q. I'm sure the Court does as well.

14 A. I have no idea what the Court does.

15 Q. So I want to talk about the  
16 protections that you referred to, which is the  
17 only independent opinion that you intend to  
18 offer in this case; is that right?

19 A. Those are your words. I don't  
20 know. I'm not sure I'd say it that way.

21 Q. How would you say it?

22 A. I'd say I offered opinions on  
23 Mr. Goldberg's assessment and on the  
24 protections.

25 Q. Okay. And apart from that,

1 ROBERT M. FISHMAN (1/10/19)

2 anything else?

3 A. I don't think so.

4 Q. What's the nature of your opinion  
5 concerning the protections?

6 A. That Bank of New York Mellon would  
7 refund any amount in excess of fees that it  
8 was ultimately entitled to take. Number two,  
9 that the budgeting process and the reserve  
10 funds does not in any way infringe on the  
11 right of parties to challenge the  
12 reasonableness of the fees. And number three,  
13 to the extent that there ever was a  
14 determination that the conduct of the bank was  
15 such that it should not be entitled to fees  
16 and if that was successfully prosecuted to  
17 conclusion, that that protection wasn't being  
18 taken away either. In all those instances  
19 there would still be a prospect for the  
20 Plaintiffs to affect the amount of fees that  
21 the Defendant was entitled to receive.

22 Q. And how did you reach those  
23 conclusions?

24 A. Well, number one, my understanding  
25 is that Bank of New York has agreed to give

1 ROBERT M. FISHMAN (1/10/19)

2 back any excess amounts that are withheld. So  
3 my understanding comes from them saying that's  
4 what they're going to do. Number two, I  
5 understand that there is an opportunity to  
6 review and object to the fees at an  
7 appropriate time as being reasonable because I  
8 think this comes from the contractual  
9 relationship. And number three, as just as a  
10 matter of law, there are certain conduct,  
11 which if you were able to successfully prove  
12 they were engaged in you'd have the  
13 opportunity to argue that that deprives a  
14 party of the right to receive fees.

15 Q. So it sounds to me that you made  
16 some factual assumptions and applied a legal  
17 analysis; is that fair?

18 A. I don't think I applied a legal  
19 analysis. I think I applied a factual  
20 analysis.

21 Q. As a matter of law, what were you  
22 referring to?

23 A. I believe -- and I'm not -- I'm not  
24 expressing an opinion about what law would  
25 apply or how it would apply. Again, we're

1 ROBERT M. FISHMAN (1/10/19)

2 talking about a hypothetical case. But I  
3 believe there are circumstances in which a  
4 Court could conclude that a party has lost its  
5 right to have its fees reimbursed based on its  
6 conduct. And someone would have to allege  
7 that, and someone would have to prove that and  
8 a Court have to find that and you might be in  
9 a position to make that argument.

10 Q. Are you familiar with Section 19.5  
11 in the plan?

12 A. I am.

13 Q. Are you offering an opinion on the  
14 meaning of Section 19.5 in this case?

15 A. The meaning of it?

16 Q. Yes.

17 A. I don't know what you're asking me  
18 about when you ask that question.

19 Q. Well, let me ask a very open-ended  
20 question. What, if anything, do you have to  
21 say about Section 19.5 within the confines of  
22 the expert opinion that you intend to offer in  
23 this case?

24 A. Well, I mean, it says what it says.  
25 And so there's really no opinions to be

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2 offered about the words that are there. It  
3 appears to create the Court's right to  
4 determine if one of the two sets of  
5 protections are appropriate; and if they are,  
6 to establish what they would be.

7 Q. It appears that's just --

8 A. That's what I think Section 19.5  
9 says.

10 Q. That's how you read it?

11 A. That's what I think it says.

12 Q. And you'd agree that the Court is  
13 capable of reading 19.5 as well, right?

14 A. I'm sure the Court is capable of  
15 reading 19.5.

16 Q. In evaluating as a matter of law  
17 what it means?

18 A. I assume the Court is ultimately  
19 going to do that regardless who it hears from  
20 on the topic.

21 Q. Do you have any factual knowledge  
22 with respect to the negotiation of  
23 Section 19.5?

24 A. None whatsoever.

25 MR. WELCH: I have no further

1 ROBERT M. FISHMAN (1/10/19)

2 questions.

3 EXAMINATION BY

4 MR. HERTZBERG:

5 Q. Just a follow-up to Mr. Welch.

6 Paragraph 41 of your declaration.

7 A. Yeah.

8 Q. You offer the opinion that "In the  
9 event that Whitebox and/or Ambac are  
10 ultimately successful on the merits of the  
11 anticipated litigation, Whitebox and/or Ambac  
12 could thereafter elect to seek a judicial  
13 determination that BNYM's conduct was such  
14 that BNYM should not as a matter of public  
15 policy be entitled to retain its fees and  
16 expenses." Do you see that?

17 A. I do.

18 Q. You understand that the only claims  
19 of Ambac and Whitebox that survived the claim  
20 are claims for gross negligence, willful  
21 misconduct and intentional fraud, correct?

22 A. Yes. Yes.

23 Q. If Whitebox or Ambac are successful  
24 on any of those claims, is there any scenario  
25 that you're aware of by which BNYM could

1 ROBERT M. FISHMAN (1/10/19)

2 retain its fees and expenses?

3 A. I would say I'm not aware that  
4 there is one and I'm not aware that there  
5 isn't one.

6 Q. So then it puzzles me that you say  
7 that after succeeding on the merits, Whitebox  
8 and/or Ambac could thereafter then seek a  
9 determination?

10 A. Right.

11 Q. Isn't the success on the merits the  
12 determination that Whitebox and Ambac need to  
13 establish that BNYM isn't entitled to its fee?

14 A. If I knew what the Complaint said,  
15 I might be able to answer your questions. But  
16 since I don't know what the Complaint is going  
17 to allege, what it's going to seek, what  
18 you're going to be able to prove and what a  
19 Court is ultimately going to decide, I really  
20 have no way of knowing if it is automatic that  
21 you would get that or if you would merely have  
22 the right to try to get that.

23 Q. You do know the Complaints that  
24 survive the plan can only allege gross  
25 negligence or more serious conduct, correct?

1 ROBERT M. FISHMAN (1/10/19)

2 A. Well, I know that gross negligence,  
3 willful misconduct and intentional fraud are  
4 the description of what survived.

5 Q. And if Whitebox and/or Ambac  
6 prevail on any of those three causes of  
7 action, BNYM is not, as a matter of public  
8 policy, entitled to retain its fees, correct?

9 A. I'm not sure if that's correct or  
10 not.

11 Q. Under what scenario could Bank of  
12 New York be found grossly negligent or to have  
13 engaged in willful misconduct or intentional  
14 fraud and still be able to retain its fees and  
15 expenses?

16 A. I don't know the answer to that  
17 question.

18 Q. You can't identify one?

19 A. I don't know the answer to that  
20 question.

21 MR. HERTZBERG: Thank you, sir.

22 (Time noted: 3:52 p.m.)  
23  
24  
25

1 ROBERT M. FISHMAN (1/10/19)

2  
3 J U R A T

4  
5  
6 I, ROBERT M. FISHMAN, ESQ., do  
7 hereby certify under penalty of  
8 perjury that I have read the foregoing  
9 transcript of my deposition taken on  
10 January 10, 2019; that I have made  
11 such corrections as appear noted  
12 herein in ink, initialed by me; that  
13 my testimony as contained herein, as  
14 corrected, is true and correct.  
15  
16

17 \_\_\_\_\_  
18 ROBERT M. FISHMAN, ESQ.  
19

20 Subscribed and sworn to before me

21 This \_\_\_\_\_ day of \_\_\_\_\_, 2019.  
22

23 \_\_\_\_\_  
24 NOTARY PUBLIC  
25

ROBERT M. FISHMAN (1/10/19)

-----I N D E X-----

WITNESS: ROBERT M. FISHMAN, ESQ.

EXAMINATION BY	PAGE
MR. HERTZBERG	5, 95
MR. WELCH	80

-----E X H I B I T S-----

FISHMAN EXHIBIT	FOR I.D.
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Fishman Exhibit 1,	8
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Declaration of Robert M. Fishman	
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1 ROBERT M. FISHMAN (1/10/19)

2 C E R T I F I C A T E

3  
4 STATE OF NEW YORK )  
: SS.:

5 COUNTY OF RICHMOND )  
6

7 I, AYLETTE GONZALEZ, a Notary Public  
8 for and within the State of New York, do  
9 hereby certify:

10 That the witness, ROBERT M. FISHMAN,  
11 ESQ., whose examination is hereinbefore set  
12 forth was duly sworn and that such  
13 examination is a true record of the testimony  
14 given by that witness.

15 I further certify that I am not  
16 related to any of the parties to this action  
17 by blood or by marriage and that I am in no  
18 way interested in the outcome of this matter.

19 IN WITNESS WHEREOF, I have hereunto  
20 set my hand this 10th day of January, 2019.

21   
22

23 \_\_\_\_\_  
24 AYLETTE GONZALEZ  
25

ROBERT M. FISHMAN (1/10/19)

ERRATA SHEET FOR THE TRANSCRIPT OF:

Case Name: In re: The Financial Oversight  
and Mgmt Board for Puerto Rico

Dep. Date: January 10, 2019

Deponent: ROBERT M. FISHMAN, ESQ.

Pg.	Ln.	Now Reads	Should Read	Reason
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ROBERT M. FISHMAN, ESQ.

SUBSCRIBED AND SWORN BEFORE ME,

This\_\_\_\_ day of\_\_\_\_\_, 2019.

Notary Public

My Commission Expires:\_\_\_\_\_